No. 404

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

CALIFORNIA REDWOOD COMPANY,

Appellant,

vs.

WILLIAM MAHAN,

Appellee.

Respondent's Points and Authorities.

BARCLAY HENLEY,
S. V. COSTELLO,
Solicitors for Respondent.

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RESPONDENT'S POINTS AND AUTHORITIES.

STATEMENT OF CASE.

On pages 2, 3, 4 and 5 of appellant's brief is to be found what purports to be a summary of the facts of this case. That statement is rather a summary of what is alleged in the Bill than what was proved at the trial. That is to say, the theory of the plaintiff here is that to establish the various allegations of the Bill it was only necessary at the trial to introduce the *record* of what was proved in

the Land Office. The Court will understand that this is an action by the grantee of the holder of a certificate of purchaser charging the defendant with being a trustee and holding the title to the land for the plaintiff. The main point of controversy, it may be stated at the outset, between plaintiff and defendant, is this:

The plaintiff contends that in this action to make out his case all he has to do is to introduce the record evidence of what took place in the Land Department, including the testimony given there by the witnesses who testified in behalf of the original entrymen, who subsequently assigned his certificate of purchase to other parties through whom the plaintiff deraigns title. Upon an offer of introduction of evidence as to what the witnesses testified to before the Register and Receiver, the objection was made by the defense that such evidence was incompetent, and that it was incumbent on the plaintiff to produce the witnesses and to make the same proof in respect to the character of the land and the various other necessary proofs which would have been required under the law by the Land Department of the Government.

The proof was received subject to our objection and exception, and the upshot of the matter was that the Court, taking the case under advisement, finally rendered its decision sustaining the view taken by the defense, and holding that the plaintiff has not made out its case, and that the defense was entitled to judgment.

On page 37 of this brief will be found the various allegations of the complaint which stand unsupported by proof, by reason of which the judgment was pronounced in favor of the defense. It will

therefore be seen that a great many of the statements commencing on page 2 in appellant's brief under the head of "Summary of Facts" cannot be received as being wholly true, unless the Court holds that the determination of the lower court as to what really constitutes legal proof be reversed.

There are a number of propositions, which I shall submit on behalf of the defense, any one of which is fatal to the cause of the plaintiff in these actions; but the question which has been most discussed, we will deal with first—that question is—

I.

What is the extent of the authority of the land department in reference to the cancellation of a certificate of purchase?

The case of *United States* vs. *Steenerson*, 50 Fed., 507, presents features sufficiently similar to these to make it an authoritative exposition of law as to what is the legal status of the final certificate under which the plaintiff in these actions by mense conveyances claims.

Speaking for the Bench in that case, Circuit Judge Shiras, now on the Supreme Bench of the United States, said, "The final certificate by the Government, acknowledging the payment in full is not in terms or in legal effect a conveyance of the lands, it is merely evidence on behalf of the parties receiving it, in a controversy, involving the title of the land wherein the person claims adversely to the United States, such claimant, notwithstanding the fact that the legal title remains in the United States may prove that by performance on his part, of the requisite acts he has become the equitable owner of the lands and that the United States holds the legal

title in trust for him. But as the claimant in such case has not received a patent or formal conveyance of the lands and has not become possessed of the title *he is required to show performance on his part*, of the acts which when done, entitle him under the law to claim a title to the land.

"When evidence of this kind is offered by the plaintiff, it is open to the United States to meet it by proof of any fact or facts, which if established, will show that the claimant has not become the real owner of the realty. And if it be true in a given case that the entry to the land was not made in good faith, but in fraud of the law, it certainly can not be said that the claimant has become the equitable owner of the land and that the United States is merely a trustee."

Further on in that decision, on pages 509–510 it is said "that as the action of the Commissioner is ex-parte, it is not conclusive, and it is still open to the claimant or his grantors, to establish a right to the land by proving a valid entry on his part, *or the performance by him of the acts required* to complete a preemption entry."

The case of the American Mortgage Company vs. Hopper et als., 64 Fed. Rep., 553, is absolutely conclusive as to the plaintiff's right to recover in this action if it is to be held as law.

We conceive that the Court will have no difficulty in reaching the conclusion that it is law, because it stands unreversed and is sustained by such reasoning and such an array of authorities that make it apparently unassailable; furthermore, it overrules the two cases cited by the plaintiff and relied upon by them: Smith vs. Ewing, 23 Fed., 741, and Wilson vs. Fine, 40 Fed., 52. Both of the cases

last cited were decided by the late Judge Deady, of Oregon.

It was sought in the American Mortgage case to invoke the doctrine of *stare decisis* in favor of plaintiffs by citing the two cases above cited, but the Court of Appeals rejected the attempt and overruled the doctrine of the two cases, as the Court will see upon the perusal of the opinion,

I do not propose to burden this brief with any very copious quotations from the decision, which is most painstaking and elaborate, but will give the Court the syllabi, which seems to have been prepared by a painstaking reporter and corresponds exactly with the body of the opinion.

The second paragraph of the syllabus is as follows: "The issuance to a pre-emptor of a final receipt or certificate of payment by the receiver of a public land office does not deprive the land office of control over, or the United States of the title to the land, and such department may cancel the entry at any time before a patent is issued when it is convinced that the entry was fraudulently made, but subject to the right of the pre-emptor to have the action of the department reviewed by the Court."

I have contended all the time in this case that in this kind of proceeding, when a Government patent is assailed, that the burden of proof rests upon the plaintiff, as in other cases, to prove every material allegation of the complaint denied by the answer; and that such proof must be made in Court the same as it was made in the Land Office.

Syllabus 3 of the American Mortgage case is as follows:

"When the Land Department cancels an entry

by a preemptor after the issuance to him of a final receipt on the ground that the entry was fraudulent and issues a patent to another, the burden is on such preemptor or those claiming under him in an action to recover the land, to show that the department erred in adjudging the title to the defendant and that the plaintiff was entitled to a patent under proof that the entry was valid as against the Government."

The fourth syllabus reads:

"A preemptor who makes his payment and receives his final certificate acquires no vested right in the land where his entry and certificate are procured by fraud."

We commend this case to the careful perusal of the Court, and also the same case as it was originally tried and reported in 56 Fed., 67.

The opinion of Judge Bellinger in the case in the lower court is one that is evidently the result of elaborate research. That case is one that, as reported in the lower court and the Court of Appelas, presents sôme very strong features in favor of the plaintiff, which the plaintiffs in this case are wholly destitute of.

In the American Mortgage case, the facts were that Waddel entered the land in dispute and paid for it, and afterwards, having received his certificate, he mortgaged it to the plaintiff corporation, and the latter brought foreclosure and obtained a sheriff's deed—on this state of facts, and after giving the sheriff's deed, the defendant Hopper having homesteaded the land and initiated a contest, and upon a hearing, it having been proven that the entry was made by Waddel for the benefit of another person, the defendant Hopper prevailed, and in due time a patent was issued to him.

The action then was on the part of the Mortgage Company against Hopper as trustee, and notwithstanding the fact *that there was no notice to either Waddel or his grantors* the Mortgage Company, when the testimony was taken, upon which the cancellation was made, the holding was in favor of Hopper, the defendant; this would seem to be violative at first glance of one of the fundamental principles of law, viz., "that no man shall be deprived of his estate without having his day in court," and speaking of that the Court say: "The Commissioner of a general land office had the power to supervise the action of the Register and Receiver and to annul the entry made by Waddel if in his judgment the proofs showed that such entry was fraudulently made and was attempted to be sustained by false testimony. But such action of the Commissioner is not conclusive, and Waddel or his grantee would still be entitled to establish his right to the land in question in any court of competent jurisdiction by proving that his entry was legal and valid and that he had *fully performed all the acts required of him by the law, to perfect and complete his pre-emption entry.* The finding of the Commissioner of the General Land Office that the entry was made for the benefit of another *was without notice to Waddel or appellant*—appellant was entitled to have its duty in court. *This it had in the present suit.* The opportunity was afforded it to prove, if it could, that the entry made by Waddel was in all respects valid. It made no attempt to show that this entry was not fraudulent. *It rested its case upon the fact that it was regularly made by a qualified pre-emptor*; that the land was paid for and the receipt of the register and receiver of the local land

office given therefor—and upon these facts contended and still insists that the Commissioner had no power to cancel the entry on the ground that it was fraudulently made.

"The appellees relied upon the patent from the Government of the United States. The suit is brought to obtain a decree declaring that appellant is entitled to the patent which was issued to appellee Hopper. To entitle it to this relief it was essential for it to show that, if the law had been properly administered, the title would have been awarded to it. The suit cannot be maintained simply upon a showing that the Land Department erred in adjudging the title to the patentee. These principles are well settled both in this court and in the Supreme Court of the United States."

Citing:

Mill Co. vs. *Brown*, 59 Fed., 35.
Bohall vs. *Dilla*, 114 U. S., 47.
Lee vs. *Johnson*, 116 U. S., 48.

Further on the Court say: "In the present case there is not pretense that any fraud, deception or imposition was practiced upon the officers of the land office in obtaining the patent issued to the defendant Hopper."

Nor is there any pretense that any fraud or imposition was practiced upon the Government by the patentees who are here sued.

Further on the Court say, "There was no proof offered tending to show that Waddel's entry was valid or was made in good faith."

NOR IS THERE ANY PROOF HERE OFFERED THAT THE ENTRIES OF THE ENTRYMEN TO WHOM THE CERTIFICATES OF PURCHASE WERE ISSUED, WERE IN GOOD FAITH.

"The stipulated facts show that his original entry was cancelled by the commissioner of the general land office for the reason that it was made upon false testimony and was not for his own benefit but for the benefit of other persons."

The allegations of the complaint here (Tr., page 4) are that the commissioner cancelled the certificates upon the ground that the entries had been made by and for the benefit of another person.

Resuming the Court say, "The burden of proof was upon the appellant to show that it was entitled to a patent, and it was essential for it to prove that Waddel's entry was valid as against the Government of the United States. The conclusions of the land department upon the invalidity of Waddel's entry having been arrived at apparently within the scope of its authority, *are prima facie correct* and appellant having assailed its correctness, *it devolved upon it to* AFFIRMATIVELY SHOW THAT THE CONCLUSIONS WERE ILLEGAL AND UNAUTHORIZED. It cannot fairly be said that Waddel had acquired any vested right to the property."

From the foregoing, which is sustained by abundant authorities, it will be seen that the keenest ingenuity could not discover any distinction in principle between the American Mortgage Co. case and the one at bar.

In that case they rested upon the record; they contended when they had shown the due application for the entry, the hearing, the payment, the issuance of the certificate that they had then made out their case, but the Court held, as we ask this

Court to hold, that the burden of proof is upon the plaintiff to show:—

1. That upon the testimony adduced before the register and receiver, they are rightfully entitled to a certificate; this they must show by original testimony in the trial of the action.

2. That they must not stop there but go farther and prove that the patentees in these cases were guilty of fraud in the proofs made by them under which they obtained their titles.

In other words, in the language above quoted, when a patent is sought to be annulled, they have got to show all the facts that they were called upon to show before the land office and they must impeach the good faith of the parties.

Burling vs. *Thompson*, 77 Cal., p. 257.

PLAINTIFF IN THIS ACTION NOT ENTITLED TO PROTECTION AS A BONA FIDE PURCHASER.

It is urged with some degree of apparent earnestness that the plaintiff here is entitled to protection as a *bona fide* purchaser.

The cases from which I have been quoting leave that question no longer open to discussion. On page 560 of American Mortgage case 64, Fed. Rep., there are a great many authorities cited to the effect that a person taking a certificate of purchase is not entitled to the protection claimed.

The language of the Court is as follows:—

"When appellant purchased the land, he took it subject to the final action of the land department, and to such proceedings as might thereafter be had in the Court to affirm or set aside the rulings of the officers of the land department in regard thereto. It purchased the land before the issuance of a pat-

ent * * * * It therefore obtained by its purchase only an equitable interest in the land and is not, for the reason stated, entitled to protection as a *bona fide* purchaser."

Citing the following cases:—

Shiras vs. *Caig*, 7 Cranch, 34.
Vattier vs. *Hinde*, 7 Pet., 252.
Boone vs. *Chiles*, 10 Pet., 177.
Smith vs. *Custer*, 8 Dec. Dep. Int., 269.
Root vs. *Shields*, Woolw., 341.
Fed. Cases, No. 12038.
Randall vs. *Ederty*, 7 Minn., 450.
Shoufe vs. *Griffiths*, Wash., 30, Pac., 93.

Taylor v Heton 77 Cal. 534

THIS PLAINTIFF, AS GRANTOR OF THE ENTRYMAN, HAS NO STATUS HERE AS A LITIGANT, THERE HAVING BEEN NO APPEAL FROM THE ORDER CANCELLING THE ENTRY.

In support of this proposition we cite the case of Buckley vs. Howe, 86 Cal., 596. The fourth syllabus of that case is as follows:

"Where the application for a homestead entry, under which the plaintiff claims was rejected and no appeal was prosecuted from the order of the register and receiver and no further steps were taken to secure its approval or to contest the issuance of the patent to the defendant, who proved up and paid for the land as a pre-emption claimant, the plaintiff possesses no right by virtue of his homestead entry to control the patent or to enforce a trust therein."

The next syllabus reads:

"Neither naked possession of the public domain nor a rejected application for leave to enter it

under whatever law it may be made, if the rejection is acquiesced in and not appealed from, will *give any such right or title as will enable the claimant successfully to attack or control a patent issued by the Government to another claimant.*" (Italics ours.) From which it would appear that it is incumbent upon the defeated contestant in the Land Department to pursue his remedy as far as he can in that department by appeal, and not having done so he loses all right to control the patent or to enforce a trust therein.

Further on, on page 601, discussing the law regarding cases in which the plaintiff may have the right to charge the defendant as holding the title to the real estate in trust, it is said: "In such a case it is not enough to show that the defendant was not entitled to have received the patent—plaintiff must also show that she herself occupies such a status toward the property as entitles her to control the legal title."

In the case of Plummer vs. Brown, 70 Cal., 546, quoting from the opinion, it is said: "To entitle the alleged owner, however, to such equitable relief he must show that he occupies such a status as entitles him to control the legal title; that the officers who awarded the land to another, to whom the title was issued pursuant to the judgment, were imposed upon and deceived by the fraudulent practices of him in whose favor the judgment was given; and that they were thereby induced to give the judgment in his favor. These things must be *distinctly alleged* and *clearly proven.*"

In this case a consultation of the allegations of the bill, page 4 thereof, will show how far short hey fall of the requirements of ordinary pleadin gs

and the rules laid down in the case last above cited. The complaint says: "That on the 21st day of January, 1896, the Commissioner of the General Land Office made an order cancelling the entry and then ensues the following allegation, which is the only one in the complaint which in any way tends to impeach or challenge the validity or rightfulness of the action of the Land Department in cancelling the said entry. The allegation is as follows:

"That said order (of cancellation) was so made and entered by the Commissioner of the General Land Office without any prior notice to your orator and without any trial or hearing and without any legal or competent evidence."

It will be noticed that *the facts* are not alleged as to what took place before the Land Office, but as a mere conclusion it is averred that the hearing was "without legal or competent evidence," without any showing or pretense *whatever as to what the evidence was.*

Resuming our notice of the case last above cited, we desire to call the attention of the Court to certain other quotations from the opinion: p. 546.

"The complaint under consideration there contains no sufficient allegations of such issuable facts; and it does show affirmatively that the plaintiff was not entitled to the relief which he demands. For it appears that in the contest as to the right to purchase the land which was the subject of the controversy, there were three issues presented."

The Court goes on to state what issues were presented and the findings of the Register and Receiver upon these issues. Resuming, p. 547 :

"But it is contended that the judgment is not couclusive against the plaintiff, because it was

rendered upon 'false and perjured testimony' and 'incompetent and immaterial evidence' of Brown, 'which the Register admitted, 'notwithstanding Brown repeatedly refused to submit to cross-examination,' and 'was prevailed upon by Brown and his attorneys to give it weight and credence, notwithstanding it was shown by the record to be false and perjured,' and 'notwithstanding it was clearly inadmissible under all rules of law and of courts and clearly incompetent and irrelevant,' and thereby 'said officers were misled and deceived, and their judgment biased by said defendant and his attorneys; and in consequence thereof said land officers * * * * contrary to the law, and contrary to the undisputed facts, thereupon ruled and decided erroneously, falsely, illegally and inequitably that the said Brown was entitled to said land, and awarded the same to him." "In these allegations there is nothing of an issuable character *as to what evidence was false or perjured, incompetent and irrelevant, upon which a court could judicially determine whether as evidence it was improperly admitted or illegally considered*; nor is there in them anything which shows what was the evidence upon which the decision was made, or that it was evidence which did not justify the decision, or showed that the decision was contrary to law. The allegations are of a general nature." (Italics ours.)

Thus it will be seen that this Court is asked in violation of the foregoing principles to hold that the order cancelling the certificate was illegal and invalid upon the bare allegations unsustained by proof that it was made without any "legal or competent evidence." We take it that such a proposition is undeserving of any further notice.

Again in the case of Sacramento Savings Bank vs. Hynes, 50 Cal., 196. the doctrine is stated, as follows, quoting from the syllabus:—

"If a Register and Receiver of a land office refused to hear the evidence of a pre-emption claimant, and allowed another pre-emption claimant to the land, to introduce his testimony and enter the same the remedy of the first party is by appeal to the Commissioner of the General Land Office. *He cannot obtain relief in equity.*" (Our italics.)

On page four of plaintiff's bill, p. 7, Trans., it is alleged that the order cancelling the entry was made upon the "pretended ground" that the entry had been procured to be made by one Charles E. Beach, etc. This apparently challenges the sufficiency of the evidence introduced before the Register and Receiver in support of the proposition that the entry was not made *bona fide* for the entryman; then follows the allegation above referred to, to the effect that the evidence was "not legal or competent"—all of which goes to show that the scheme of the bill apparently is that this Court is asked to declare the defendant a trustee of the patent, upon the ground that the evidence introduced was "insufficient" and was "illegal and incompetent"—*and this without setting forth the evidence or affording to this Court a hint as to its character.*

In the case of *Gale* vs. *Best*, 78 Cal., 235, we are sharply advised as to the fate of such attempts as these.

That was an action for the possession of land by a defeated contestant in the land office against a successfal one. The question of fact that was presented before the Register and Receiver, was as to the character of the land, whether agricultural or

mineral. The Register and Receiver held that it was of a certain character and it was sought in the action to reopen that question. The Court held that it was within the exclusive jurisdiction of the land department to decide that question of fact and that it was not subject to inquiry in the action.

Quoting from *Steel* vs. *Smelting Co.*, 106 U. S., 447, as follows:

"We have so often had occasion to speak of the land department, the object of its creation and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise, to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on that subject.

"That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the different requirements of the acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class that is open to sale." Does not this case afford cause for another "unpleasant surprise?"

The proposition advanced is that as to the ques tion of fact that necessarily arises in the entry of a portion of the public domain, the decision of the land department is final and conclusive.

Resuming, the Court says, in *Gake* vs. *Best*, *supra*: "If intruders upon them could compel him (the patentee) in every suit for possession, to establish the validity of the action of the Land Department,

and the correctness of its rulings upon matters submitted to it, the patent, instead of being a means of peace and security would subject his rights to constant and ruinous litigation."

There are other portions of this decision which are highly instructive, to the consideration of which we commend the Court.

It is claimed by appellant that under no circumstances has the Commissioner of the General Land Office the power to cancel an entry, except upon notice to the parties interested; to that a number of cases are cited, among them, *Wilson* vs. *Fine*. 14 Sawyer, 224, and *Smith* vs. *Ewing*, 56 Sawyer, 56, which we have shown have been overruled—these being the two cases by Judge Deady which have heretofore been made the subject of comment. None of the cases, we insist, will be found to sustain the contention. But if notice were necessary, to the valid cancellation of an entry, where, we ask, is the proof in this case that such notice was not given?

Notice to plaintiff is not necessary, but the record fails to show a want of it.

We have already shown that the burden of proof is upon the plaintiff. They allege on page four of their bill that the order cancelling the entry was made without prior notice or without any trial or hearing and "without any legal or competent evidence." Where, we ask, is the proof to sustain these allegations? They are alleged as being material to sustain plaintiff's action. If they had not been material they would not have been alleged. Being alleged, why should they not be proved?

Where, we ask, is the proof in this case of the want of notice? The presumptions are all in favor

of the regularity of the action of the Register and Receiver, a presumption that attends upon all the acts of public officers, that everything that was necessary to be done to sustain the validity of their official acts was done.

In the case of *Darcy* vs. *McCarthy* 35 Kan., 722; 12 Pac., 104, the second syllabus is as follows:

"The Commissioner of the General Land Office has supervisory control over the subordinate officers in the land department, and can revise and correct their decisions; and where an erroneous entry made by the Register and Receiver was cancelled by the commissioner it will be presumed, *in the absence of evidence to the contrary*, that it was done in accordance with the rules governing such action and upon sufficient evidence."

In the case of *Jones* vs. *Meyer*, 26 Pac., Rep. 215, the doctrine is again laid down that a purchaser of a certificate of purchase is not, within the meaning of the law, an innocent purchaser. This is a very interesting decision, and we quote as follows from page 218 :

"The power of supervision given to the secretary and commissioner is a general one, over all the acts of the Register and Receiver. There is no exception made in the matter of issuing final certificates, and if the position here contended for be the correct one, to wit., that the commissioner must issue a patent at once upon the presentation of the certificate and that issue of the certificate would conclude all inquiry into matters settled by its issue, then it would conclude all supervision of the superior officers; and on that reasoning the patent might as well issue by the local as by the supervisory officers. I am led to adopt the contrary of

this reasoning. Besides, any other view would lead to hopeless conflict between the department and the courts. Our calendars would be crowded with land contests, and the action of the department would be indefinitely postponed.

"The only true doctrine in my opinion is that announced by the Supreme Court—that the jurisdiction of the Court commences when that of the department ceases; and that until the patent issues and while the matter is still pending before the department, the question is not one of private right, upon which the courts have power to act.

"We are of the opinion that if a pre-emptor has not complied with the law and procures a final certificate through fraud or perjury, a purchaser from him gets no better title than such pre-emptor obtained, and if such fraud or failure to comply with the law is established to the satisfaction of the land department, under its rules and regulations, before patent has been issued, the land department has the authority to cancel such certificate."

In the case of *Swigart* vs. *Walker*, 30 Pac. Rep., 162, we have the doctrine reiterated. Quoting from the decision, page 162, we have the following:

"The only question represented is as to the power of the United States Land Commissioner to set aside the entry, and to cancel the final receipt which has been issued. We have no doubt of the power of the commissioner. It is not claimed to have been exercised erroneously or fraudulently, and if he is warranted in taking such action in any case, it will be presumed to have been regularly and legally done in this case. The action of the local land officer is final, but is subject to the

supervision and control of the commissioner and his superior officer, the Secretary of the Interior. Until the patent issues, the commissioner, under the direction of the Secretary, is vested with full power to review and correct any error in the preceding steps taken in the disposition of the land, and may inquire into and arrest any act of fraud committed against the Government. Their power does not end with the issue of a final receipt.

"This was practically decided in the case of *Darcy* vs. *McCarthy*, 35 Kan., 722; 12 Pac. Rep., 104, *supra*, and most of the adjudicated cases on the question sustain that view.

Pierce vs. *France* (Wash. st.), 26 Pac. Rep., 192.
Jones vs. *Meyers*, (Idaho), 26 Pac. Rep., 215.
Hestres vs. *Brennan*, 50 Cal., 211.
Judd vs. *Randall* (Minn.), 29 N. W. Rep., 589.
Forbes vs. *Driscoll*, 31 N. W. Rep., 633.
Vantongeren vs. *Hefferman* (Dak.), 38 N. W., Rep., 52.
Barnards' Heirs vs. *Ashleys' Heirs*, 18 How., 45.
Bell vs. *Hearne*, 19 How., 252.
Harkness vs. *Underhill*, 1 Black, 316.
Marquez vs. *Frisbie*, 101 U. S., 473.
U. S. vs. *Schurz*, 102 U. S. 378.
Steel vs. *Smelting Co.*, 106 U. S., 447; 1 Sup. Ct Rep, 389.
Randall vs. *Edert*, 7 Minn. 450.
Gray vs. *Stockton*, 8 Minn., 529 (Gil. 472).
Ferry vs. *Street* (Utah) 11 Pac, Rep., 571.

"When Swigart purchased the land he was aware that no patent had been issued, and took it subject to a re-examination and to the right of the department to cancel the entry for sufficient reason. *No*

appeal has been taken from the order of cancellation, and having been made with authority, Swigart had no title to the property, and hence the judgment of the District Court must be affimed."

The above case was decided in the Supreme Court of Kansas.

Again in *Fernald* vs. *Winch*, 31 Pac. Rep., 665, the doctrine is re-affirmed. We quote from the syllabus:—

"The commissioner of the general land office of the United States has authority to cancel a final pre-emption receipt, and set aside the entry, before patent issues thereon; and a mortgagee of the entry man, after final receipt is given, and before the issuance of the patent takes his mortgage subject to this supervisory power of the commissioner and of tne Secretary of the Interior."

The case of *Swigart* vs. *Walker*, above citen, followed.

In the case of *Sparks* vs. *Pierce*, 115 U. S., 408, this point is again announced; this case is also reported in Book 29 of the U. Supreme Court Reports, L. C. P. Co.; opinion by Justice Field. We quote as follows—

"To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department and being respected would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that in consequence of erroneous rulings

of those officers on the facts existing, it was denied to him."

Citing—

Bohal vs. *Dilla*, 114 U. S., 51.

Applying the above principle to this case, how, we ask, has it been shown in this case that the plaintiff had a better right to the land than the defendant? How is it shown by the plaintiff here that it had such a right as would have been respected by the officers of the Land Department, and being so respected it should have given him the patent?

The only answer to that the plaintiff can give to this question is, "We got our certificate of purchase, and therefore that gave us the right to the patent." But the department had decided, as alleged in the complaint, that the certificate of purchase was obtained by the entryman for the benefit of another person, and therefore was fraudulent and void.

Under the decisions heretofore cited, how has it been shown that the plaintiff or the entryman had a better right to the patent than the patentee? As to whether he had or not was a question of *fact* determined by the Register and Receiver upon the testimony adduced; but as to what that testimony was there is no evidence here by which the Court can determine whether it was "relevant or incompetent," and as to the question of fact, viz., as to whether the entry was made for the benefit of another person, that question is foreclosed by the decision of the Register and Receiver and cannot be adjudicated here—and is not sought to be. As to what the evidence was, as above stated, we are completely in the dark—in fact, it is not within the

scheme of this bill that the character of that evidence should be subjected to criticism and scrutiny here. The fact is that the plaintiff relies upon THE RECORD OF THE CASE, and that is all that we have.

Again, in the case of *U. S.* vs. *Marshal Mining Co.*, 129 U. S., 579 L. Fed., 32,734, we quote from the syllabus as follows: (Opinion by Justice Field.)

3. "If the officers of the land department have acted within the general scope of their power and without fraud, the patent which has been issued must remain a valid instrument and the Court will not interfere unless there is such a gross mistake or violation of the law which confers their authority—as to demand a cancellation of the instrument.

4. Errors and irregularities in entering and procuring title to the public lands ought to be corrected within the land department so long as there are means of revising the proceedings and correcting such errors.

5. A bill in Chancery brought by the United States to set aside and vacate a patent issued under its authority is not to be treated as a writ of error or as a petition for a re-hearing in Chancery or as a retrial of the case with additional proof."

Further on in this decision, we have the following:—

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issuance nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent was procured.

"Especially is it true where the United States

On page 14 of the plaintiff's brief there are a number of authorities cited to the effect that the Government had no power to patent land which had previously been sold to another, unless the first sale has been legally and properly cancelled; to that we yield our hearty consent; but in in the present case there has been a valid prior cancellation of the sale or entry.

Some additional authorities on the first proposition.

At the hazard of being desultory, I desire to submit some few additional authorities on a proposition heretofore discussed.

The case of *Bohall* vs. *Dilla*, 114 U. S., reported also in Book 29, L. E. page 61, reads as follows:

"To charge the holder of a legal title to land under a patent of the United States as the trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the Government, and that in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found, it was refused to him.

"It is not sufficient that there may have been error in adjudging the title to the patentee; it must appear that by the law properly administered the title should have been awarded to the claimant."

Smelting Co. vs. *Kemp*, 104 U. S., 636–47.

Thus again we have it from the highest Court in the land that in order to prevail against a patentee the party asking the relief must show, by evidence,

that to him should the patent rightfully have been issued.

The opinion in the latter case was by Justice Field; and the case it seems originated in Humboldt County.

Again in the case of *Hosmer* vs. *Wallace*, 47 Cal., 461, which was reaffirmed in 97 U. S., 575, L. Ed., 24:1130, the doctrine is announced, "that the decision of the land department in a case of contest upon questions of fact is conclusive." The syllabus of this case carefully summarizes the substance of the decision, to which, however, we refer the Court. Syllabus three reads as follows:

"In the absence of fraud on their part and of fraudulent imposition of the officers of the United States Land Department their determination (Register and Receiver) in matters of fact relating to the entry of land cannot be reviewed by the Courts, but their determination upon questions of law may be."

As we have heretofore shown the gravamen of the plaintiff's bill is that upon alleged incompetent and irrelevant testimony, the certificate of entry of the plaintiff's predecessor was cancelled —but again, we will draw the Court's attention to the fact that we are not called upon to accept the unproved allegation of the plaintiff's bill that the evidence was "incompetent" or "irrelevant." It was incumbent upon them to aver and prove what their evidence *was*, which they did not do. As to whether the evidence was insufficient or not involves the determination of the question: "Was it sufficient to prove the facts at issue?" But as to that it was a question of fact, which it was within the exclusive competency, within the principles

above announced, of the Land Department to determine, and that department having made a finding it is not subject to a review here.

The late case of *Gonzalez* vs. *French*, 164 U. S., 338, reported also in the advance sheets of the opinions of the United States Supreme Courts by the Lawyer Co-operative Pub. Co. and decided November 30th, 1896, is still further definitive as to the law.

This was a case of the filing of an applicant for the entry of a piece of land having been rejected by the Register and Receiver. The syllabus is as follows:

"When a claim to public land has been passed upon by the proper local officer of the Land Department and upon appeal by the Commissioner of the General Land Office and upon further appeal by the Secretary of the Interior, and in pursuance of their decisions a patent has been granted for the land, a pre-emption claimant in order to recover the land from the patentee must aver and prove either that the Land Department erred in their construction of the law or that fraud was practiced upon its officers or that they themselves were charged with fraudulent practices."

In the body of the decision, page 96, we have the following:

"The Register and Receiver was therefore warranted in rejecting the claim of the plaintiff in error, and at any rate, as she did not appeal from their decision, *to the Commissioner of the General Land Office she must be deemed to have acquiesced therein and is precluded thereby so long as it remains unreversed.*"

RECOVERY OF PLAINTIFF PRECLUDED BY LACHES.

The entry of the predecessor of the California Redwood Company, in the case against Mahan, was cancelled on June 7, 1889; this action was commenced on the first day of December, 1894, being over five years before a step was taken by the plaintiff for the enforcement of its alleged rights. Their equity is stale.

In determining the extent and degree of laches which bar a recovery Federal Courts of equity are governed by analogy by the Statutes of Limitation of the State in which the action arose. The California period of limitation is five years. There is nothing in any of the circumstances of this case which warrants the Court in not applying this rule here.

Whenever a bill shows on its face a want of diligence, and whenever it shows, as these bills do, that the time has run to such an extent as would constitute a bar under the statutes of limitations, the bill then must be dismissed, unless reasons are alleged which will satisfactorily account for the delay in the institution of a suit.

In the case of *Landsdale* vs. *Smith*, 106 U. S., 391, this doctrine is again stated. The case of *Badger* vs. *Badger* is there cited. In that case the Court, speaking by Justice Grier, said: "that a party who makes an appeal to the conscience of the Chancellor should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights and the means used by the respondent to keep him in ignorance and how and when he first came by the knowledge of the matters alleged in his bill, otherwise the Chancellor

may justly refuse to consider his case on his own showing, without inquiry whether there is a demurrer or formal plea of the Statute of Limitation contained in the answer."

Book 27 of the L. Ed., U. S. Repts, page 219.

This principle is too familiar to justify any elaboration.

In these cases, all of the bills show that more than five years had elapsed after the cause of action accrued, viz., the cancellation of the entries, before anything had been done in the way of asserting the rights of the plaintiffs by action. There is nothing in the bill to excuse the delay—no explanation of what were "the impediments to an earlier prosecution of the claim"—no hint as to why the plaintiff slept so long on its rights. In this view of the matter, we ask what escape can there be from the ban of inexcusable laches? And while in our amended answer, we have set up this plea, under the authorities last above cited, it does not seem to have been necessary to have done that.

"A chancellor," in the language of the above decision, "without inquiry as to whether there is a demurrer or formal plea of the Statute of Limitations contained in the answer, will refuse to consider the case."

In the case of *Lang Syne M. Co.* vs. *Ross*, 20 Nev. 140, the Court, speaking by Judge Hawley, uses the following language:

"The Statutes of Limitation, where they are addressed to courts of equity, as well as to courts of law, as they seem to be in all cases of concurrent jurisdiction at law and in equity—to which they directly apply seem equally obligatory in each court.

It has been very justly observed that in such cases courts of equity do not act so much in analogy to the statutes as in obedience to them."

2 Storys Eq. Jur. 1520.
Norris vs. *Haggin*, 28 Fed. Rep. 278, and authorities there cited.
Hardy vs. *Harbin*, 4 Saw., 548.
Norton vs. *Meader*, *Id.* 615.

Material allegations of the Bill denied in the answer and unproved at the trial.

We will now call the attention of the Court to a number of allegations in the plaintiff's bill which stand unsupported by proof.

1. The allegation as to the citizenship and age of the entryman.

2. That the entryman has never made any other application under the Acts of Congress and did not apply to purchase the land on speculation, but in good faith for his own benefit, etc.

3. The posting by the Register in his office, for the period of sixty days, of the notice of the application.

4. That the notice was published for sixty days in a newspaper.

5. That no adverse claim was filed.

6. That the applicant furnished the Register with satisfactory evidence that the notice had been published for sixty days in a newspaper nearest to the location of the land.

7. That the land was chiefly valuable for timber.

8. That the cancellation was made without previous notice and without any trial or hearing and without legal or competent evidence.

9. That at the time of the conveyance to the plaintiff it was without knowledge or notice that the entrymen had been acting as a "dummy."

10. That at the time of the conveyance the entrymen claimed to be the legal owner, and that plaintiff received the conveyance in good faith, believing it to be entirely valid, regular, and honest.

None of the allegations above specified have been proved. They are material allegations, necessary to be proved in order to entitle the plaintiff to recover —if they had not been deemed to have been material they would not have been inserted in the complaint.

The judgment of the lower Court should be affirmed.

Respectfully submitted,

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S. V. COSTELLO,
Solicitors for Respondents.